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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1982

EDWARD PAUL CHARAPATA,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

ANNE CHARAPATA,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioners, Edward Paul Charapata and Anne Charapata, who were defendants below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in these cases on January 18, 1983. A timely petition for rehearing was denied on May 9, 1983.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether The Government's Contention Of Strong Evidence Of Guilt Can Overcome The Heavy Presumption of Prejudice Resulting From A Sub Rosa Intrusion Of The Prosecutor's Belief In The Defendants' Guilt Into A Criminal Jury's Deliberations?

2. Whether A District Court's Failure To Conduct A Prompt and Thorough Investigation Into A Presumptively Prejudicial Jury Intrusion, And to Take Timely Curative Measures Invalidate Its Decision That The Jury Intrusion Was Non-Prejudicial?

3. Whether Rule 606(b) Of The Federal Rules Of Evidence Prohibits A District Court From Eliciting And Relying On Post-Verdict Testimony Of The Jurors Concerning The Effect Of Extraneous Communications On A Criminal Jury's Deliberations, In Order To Overcome The Presumption Of Prejudice?

4. Whether The Fourth Amendment Can Be Circumvented By Federal Criminal Investigators By Conducting A Prolonged Surreptitious And Warrantless Search Of A Suspect's Papers And Files Under The Guise Of A State Civil Audit.

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## OPINIONS BELOW

The May 9, 1983 Order of the United States Court of Appeals for the Ninth Circuit, denying the petitioners' Petition for Rehearing, is unreported. It is set forth in the Append. at 1a. The January 18, 1983 Memorandum Opinion of the Court of Appeals, affirming the final judgments of conviction in the District Court, is unreported. It is set forth in the Append. at 3a.

The Judgments of Conviction and Commitment entered by the District Court on June 10, 1981 are unreported. They are set forth in the Append. at 10a and 15a.

The Findings and Conclusions as to Motion For New Trial issued on August 14, 1981 by the District Court is unreported. It is set forth in the Append. at 19a.

The May 26, 1981 oral ruling and

findings of fact of the District Court denying petitioners' motion for new trial is unreported. The reporter's transcript of this ruling is included in the Append. at 30a.

The February 9, 1981 oral ruling and findings of fact of the District Court denying petitioners' motion to suppress is not reported. The reporter's transcript of this ruling is included in the Append. at 35a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 18, 1983. A timely petition for rehearing and suggestion for a rehearing en banc was denied on May 9, 1983, and this petition for a writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment IV, Append. at 39a.

Amendment V, Append. at 39a.

Amendment VI, Append. at 40a.

United States Code

Title 18, § 2, Append. at 42a.

Title 18, § 1001, Append. at 42a.

Title 21, § 610, Append. at 43a.

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Title 26, § 7206, Append. at 47a.

Federal Rules of Evidence

Rule 606(b), Append. at 49a.

Federal Rules of Criminal Procedure

Rule 8, Append. at 51a.

## STATEMENT OF THE CASE

Petitioners Edward Charapata and Anne Charapata, husband and wife, were indicted on July 31, 1980 in twenty-one counts by a grand jury in the United States District Court for the District of Oregon. CR 1.[1/] The original jurisdiction of the district court was invoked pursuant to 18 U.S.C. §3231.

Counts 1 through 13 of the indictment charged violations of 18 U.S.C. §1001, through the making of false statements on nursing home cost reimbursement statements to a government agency. Counts 14 through 17 charged violations of 26 U.S.C. §7206(1) in

1/ References to the Clerk's Transcript will be indicated as "CR"; references to the Reporter's Transcript of the Medicaid and tax trial will be indicated as "RT"; references to pretrial and post trial proceedings will include the date of the proceeding and, where (cont'd next page)

the filing of false United States individual and corporate income tax returns. Count 18 charged violation of 26 U.S.C. §6206(2) by aiding and abetting the preparation of a false United States corporate income tax return. Count 19 charged a violation of 26 U.S.C. §7203 by failing to file a United States corporate income tax return. Counts 20 and 21 charged violations of 21 U.S.C. §610(b)(2) and §676 through the selling and transportation in interstate commerce of uninspected meat.

Edward Charapata was charged in each count of the indictment. Anne Charapata was charged only in counts 5, 11, 13, 14, 15, 18 and 19.

Two of the counts against Edward Charapata, counts 20 and 21 (the meat counts),

1/ (cont'd) appropriate, the initials of the person interrogated; and references to the May 27, 1981 sentencing transcript will be indicated as "RT Sentencing."

were severed by the district court for separate trial which was conducted immediately preceding trial on the remaining 19 counts.

On February 19, 1981, after a three-day trial, Edward Charapata was convicted on one meat count and acquitted of the second count. RT FMIA 499-500; CR 78.

The trial of both petitioners on the fraud and tax counts commenced on February 24, 1981, on the second court day after the conclusion of the meat trial. On March 12, 1981, after a three-week jury trial, Edward Charapata was convicted on counts 1 through 18, and Anne Charapata was convicted on counts 5, 11, 13 and 18. Both petitioners were acquitted of an additional corporate tax count (count 19). CR 95; CR 96.

Each petitioner was sentenced to a prison term on a single count of making false statements on nursing home cost reimbursement

statements to a government agency. Mr. Charapata was ordered committed for five years; Mrs. Charapata for three years. They also received substantial financial penalties. Judgments, Append. at 10a-18a.

1. Facts Pertaining to Illegal Search Issue

Prior to trial, the petitioners moved to suppress much of the government's evidence on the grounds that it was the product of a six-month-long secret and illegal search of petitioners' papers and records. CR 52. A suppression hearing was conducted, RT Feb. 9, 1981, which revealed that the indictment resulted from a search conducted by Donald Lauritsen, a civil auditor with the State of Oregon Adult and Family Services Division, on behalf of the Inspector General's Office of the United States Department of Health, Education and Welfare ("HEW").

In November of 1976, Lauritsen commenced

a routine civil cost audit of several of the defendants' nursing homes. RT Feb. 9, 1981 at 75. His audit continued through June or July of 1977. RT Feb. 9, 1981 at 74, 75. The petitioners and members of their staff cooperated in providing whatever records Lauritsen properly requested. RT Feb. 9, 1981 at 90.

Unknown to petitioners, on April 25, 1977, William Edward Griffith, an officer of the Inspector General's Office of the United States Department of Health, Education and Welfare ("HEW"), officially began his own warrantless investigation of petitioner. RT Feb. 9, 1981 at 57, 60. Rather than contacting the petitioners, he conducted his investigation surreptitiously by using the cover of Lauritsen's civil audit from whom he requested and received all the information he needed. RT Feb. 9, 1981 at 59, 62-63, 64,

65, 80-81, 87.

Griffith testified that "if I saw an expenditure and it looked suspicious, Don and I would talk it over and Don Lauritsen would expand his audit to include that document." RT Feb. 9, 1981 at 62. See also CR 52 (Append. thereto at 55, 56, 59). (Griffith's pretrial testimony that Lauritsen obtained documents at his request). Griffith described his relationship with Lauritsen as "piggy-back[ing]," "work[ing] together" "side-by-side", and one in which they discussed on "numerous occasions" information Lauritsen was obtaining from Petitioners and made decisions on what they needed "jointly". R.T. Feb. 9, 1981 at 58, 59, 60, 61-63. CR 52 (Appendix thereto at 54, 55, 61). Griffith also participated with Assistant United States Attorney Collins and other officials of HEW to determine whether or not to conduct

a criminal investigation. CR 52 (Append. thereto at 58).

Griffith recommended prosecution in September 1977. RT Feb. 9, 1981 at 50. The Government concedes that, by January 12, 1978, Griffith's findings and recommendations were presented to the United States Attorney and the case was referred to a federal Grand Jury. Subsequently, a Grand Jury subpoena was served on Lauritsen by Earl M. Campbell with whom Griffith had recommended a criminal investigation. CR 58 at 3, 8. The subpoena requested production of the very documents illegally searched and copied by Lauritsen (and Griffith) during the months before. The fruits of the six-month long, secret and warrantless search of petitioners' papers and files thus became the basis for the grand jury investigation and the resulting indictments.

The district court denied petitioners' motion to suppress the evidence seized by Lauritsen and Griffith on the grounds that the search was not improperly motivated or unlawful and petitioners had consented to it in their provider agreements. RT Feb. 9, 1981 at 104-106; CR 68 (reproduced in Append. at 36a). The Court of Appeals affirmed the trial court's ruling on the ground that petitioners' had no privacy interest in the material once it came into Lauritsen's possession. (Append.at 7a-8a.)

2. Facts Pertaining To The Jury Intrusions

On March 2, 1981, the fifth day of the medicare/medicaid and tax trial, alternate juror Alloway was approached by Jack Waggoner at a bus stop. Waggoner identified himself as the brother-in-law of Ron Hoevet, one of the Assistant United States Attorneys who prosecuted this case. While discussing

Hoevet and his official duties, including Hoevet's previous child pornography prosecution, Waggoner sub rosa stated the prosecutor's opinion that the petitioners were guilty. RT 782.

The next day in an elevator at the courthouse, juror Alloway reported the opinion of guilt and its source to Tawny Balash, a sitting juror. This conversation was witnessed by a Judge who told Alloway to report the Waggoner incident to the trial court.

Alloway reported both the bus stop conversation with Waggoner and the unidentified Judge's comment, to the district court. She was interviewed by the court in counsel's presence on March 3 and 4, 1981. In these interviews, Alloway lied when asked if she had told Balash the substance of the communication from Waggoner. She stated

incorrectly: "I did not relate the conversation." RT 784, line 5. Alloway also failed to inform the court that she had told Balash that Waggoner was the prosecutor's brother-in-law. RT 1133.

The district court refused defense requests to conduct a hearing with Balash concerning the jury intrusion. The district court also refused to investigate whether Alloway had told any other jurors about the jury intrusion, or to identify and question the Judge in the elevator. The district court also refused to admonish Alloway not to discuss the matter with the jurors. RT 1133-34. Despite repeated defense requests for an inquiry of the Judge who was present at the Alloway-Balash conversation, the district court also failed until after trial to locate and question that Judge. RT 1669; RT/J.W. March 31, 1981 at 24.

After the trial, the district court identified and spoke with Judge Skopil of the Ninth Circuit, who had overheard the Alloway-Balash discussion, and later put its hearsay version of its conversation with Judge Skopil on the record. Ibid. According to the district court, Judge Skopil reported that he overheard Alloway inform Balash that she had spoken to a relative of one of the attorneys about the case. RT/J.W. March 31, 1981 at 24-25. Alloway had denied so identifying to Balash the person who conveyed the prosecutor's opinion of guilt to her. RT 1133.

Given the conflict between Judge Skopil's version and Alloway's versions of the elevator encounter, petitioners urged the district court to examine Balash. CR 105. The trial judge then examined both Balash and Waggoner by telephone, RT/J.W. March 31, 1981; RT/T.B. March 31, 1981.

Balash admitted that Alloway told her that a close relative of one of the attorneys in the case had informed her of his opinion that the petitioners were guilty. RT/T.B. March 31, 1981 at 4, 7. In addition, Balash said that Alloway plainly had been very upset by the incident and had told several other jurors about it as well. Id. at 4. This was the first the trial court and counsel learned of these facts.

Immediately after the Balash and Waggoner interviews, petitioners requested a prompt hearing to interrogate the other jurors. Four weeks had already elapsed since the jury intrusions. Mrs. Balash's interview indicated that her memory of the trial and the surrounding events was fading. RT/T.B. March 31, 1981 at 5-10. Time plainly was of the essence; yet the delays continued.

On May 11, 1981, the hearing finally was held, ten weeks after the jury intrusion. This six-week delay after the interrogation of Balash seriously hampered the inquiry because the jurors had difficulty with recollection, resulting in a potpourri of frequently conflicting juror recollections by the time they were all questioned. RT May 11, 1981 at 13, 21, 24, 32, 42, 47, 50, 57, 63.

The May 11, 1981 hearing nevertheless revealed the following striking facts:

(1) Every juror who had deliberated was aware that an extrajudicial communication to Alloway occurred. RT May 11, 1981 at 4, 10, 14, 20-21, 24-25, 29-30, 37, 42, 43, 46-48.

(2) Several jurors recalled the jury room discussion of the conversation at the bus stop. Id. at 20-21, 32, 36, 42, 50-51, 60.

(3) Other jurors recalled discussion of the conversation in the elevator. Id. at 25, 39, 47.

(4) Five deliberating jurors believed that the communication came from the brother of the prosecutor, from the defense counsel or from a relative of the defendants. Id. at 29, 32-33, 42, 51-52, 61.

(5) Eight jurors, including six who deliberated, used serious terms to describe the incident, i.e. that Alloway was "accosted" (Clark), "frightened" (Carlsen), "quite disturbed" (Saxton), "very scared" (Jaynes), "startled" (Dobbs), and "upset" (Daniels, Brumley, Balash). Id. at 5, 38, 49, 54, 57, 59, 60, 62; RT/T.B. March 31, 1981 at 8.

(6) Every sitting juror and alternate juror admitted that he or she had violated his or her oath and the district court's daily instructions not to discuss the case or

listen to discussions of the case. RT May 11, 1981 at 5-6, 10, 17, 21, 22, 25, 29-30, 32-33, 34, 37, 42, 45-46, 48, 52, 54, 57, 60; RT/T.B. March 31, 1981 at 4, 8-9.

Over the objection of defense counsel, e.g. RT May 11, 1981 at 2-3, 9, the district court questioned these jurors, well after their verdicts had been rendered, about whether the extrajudicial communication had affected their deliberations. All the jurors represented that the incident did not affect the deliberations. Id. at 7, 11, 15, 19-20, 25-26, 30-31, 33-34, 38, 43, 51-52; RT/T.B. March 31, 1981 at 10.

However, in addition to juror Balash, juror Jaynes (who later was excused) recalled that Alloway had said that Waggoner had stated that the petitioner were "just pla[i]n guilty." RT May 11, 1982 at 48.

Juror Frentess, who deliberated,

remembered that it was "very possible" that Waggoner had said something to Alloway about guilt or innocence. Id. at 53. She also recalled that he was the brother or brother-in-law of one of the attorneys in the case. Id. at 50-53.

Juror Dobbs, who also deliberated, recalled that Waggoner had made "a rather pointed statement" (Id. at 42) to Alloway that "the Charapatas were guilty or were not guilty" (Id. at 44-45). She also recalled that he was "related to someone pertaining to the Charapatas" or "possibly could be one of the Charapata's attorneys." Id. at 42-43. Her recollection on this, however, was not clear. And, when she testified in May, Dobbs could not recall whether the statement was of guilt or innocence (Id. at 44-45), although she did know which in March when she learned of the statement (Id. at 45). She had since

then "put it out of [her] mind" (Id. at 42-43) as had juror Twedt who "blocked [what she heard] out" after hearing of the incident with Waggoner (Id. at 17).

Juror Dobbs remembered, however, that Alloway made her statement about the incident and the pointed statement of guilt or innocence in the jury room on the morning after the incident, when most of the jurors were assembled. According to her,

> It became a general discussion. Everyone was startled [that] anything like this would evolve -- it went around -- people talked about it for a few minutes.
>
> Id. at 49 (Emphasis added).

Juror Dobbs admitted she too was startled. Id. at 46.

The district court denied petitioners' motion for a new trial on the grounds that the jury intrusion was not prejudicial. From the bench the district court made findings

that the jurors were truthful in describing the incident as as not affecting their deliberations. RT Sentencing at 8-9. (Reprinted in Append. at 30a-31a). Two months later, well after the notices of appeals had been filed, the district court entered formal findings of fact to support its denial of the petitioners' motion for a new trial. The district court's written findings attempt to minimize the importance of the jurors' own statements concerning the effect of the intrusions on their deliberations and, with the advantage of hindsight, added additional findings in support of its conclusion that there was "no reasonable possibility" that the incident could have tainted the verdict. CR 135-36; (Reprinted in Append. at 19a.)

The Court of Appeal's brief memorandum opinion conceded that a more thorough

examination of the jury intrusion or misconduct would have been preferable. Nevertheless, the Court of Appeals affirmed the district court's finding that the jury's exposure to extrinsic material was "harmless beyond a reasonable doubt," (see Append. at 5a) relying upon the following factors:

(1) The jury had only a vague recollection of the incident at the time of the post-trial examination;

(2) The extrajudicial communication was expressed in the form of an opinion rather than a statement of objective fact;

(3) The district court gave a daily instruction to the jury not to discuss the case or expose themselves to extrinsic material and to consider only the evidence produced at trial; and

(4) There was strong evidence of guilt.

The Court of Appeals thus ignored a

number of critical facts. For example:

(1) The vagueness of juror recollection almost certainly resulted from the district court's failure to conduct a prompt investigation and to take protective measures once the intrusion was brought to its attention;

(2) After verdict, the district court improperly inquired into the subjective effect of the juror intrusion on the juror's deliberations and decision (See Rule 606(b) Fed. R. of Ev.), and relied upon the results of that testimony for its decision;

(3) The jurors by their own admissions had disregarded the District Court's instructions not to discuss the case or to expose themselves to extrinsic material;

(4) The intrusion was of the gravest sort going to the ultimate issue of guilt or innocence and was intrinsically prejudicial

because it involved a sub rosa expression of the prosecutor's belief in the petitioners' guilt.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI IN ORDER TO ADDRESS SERIOUS ISSUES OF CONSTITUTIONAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE RESOLVED, AS WELL AS CONFLICTS AMONG THE CIRCUITS, CONCERNING INTRUSION OF DAMAGING MATTERS INTO CRIMINAL JURY DELIBERATIONS.

In this case a criminal jury was infected sub rosa by extrinsic matter going to the ultimate issue of guilt or innocence. An extrinsic opinion of guilt, attributed to the prosecutor, was secretly introduced to the jury. This prosecutor opinion of guilt was set at large among the "startled" jurors like a loose cannon.

Under prior decisions of this Court, a heavy presumption of prejudice plainly attaches to such an intrusion. Partly relying on improper evidence (See Rule 606(b) Fed. R.

Ev.) and partly relying on the Government's contention that strong evidence of petitioner's guilt outbalanced or eliminated the presumption of prejudice, the lower courts refused to vacate the convictions that were tainted by this gross intrusion. No decision of this Court allows the presumption of prejudice to be overridden by such a showing. Indeed, the decisions of the courts below are part of a dangerous trend to eliminate the presumption of prejudice as a standard for use in federal jury intrusion cases. See, e.g., United States v. Bruscino, 687 F.2d 938 (7th Cir. 1982), (en banc); United States v. Shapiro, 669 F.2d 593, 602-605 (9th Cir. 1982) (Skopil, J. concurring).

As will appear below, this case thus provides this Court with an appropriate vehicle to treat with and clarify the law of jury intrusions with respect to the presumption

of prejudice. Other reasons exist for this Court to review the instant case.

By the time the district court finally acted, weeks after the intrusion, it was no longer possible to determine accurately its effect on the jury. This case thus presents a particularly egregious injustice because the district court's refusal to investigate promptly exacerbated the jury taint by allowing rumors and suspicion to spread and fester and by rendering the subsequent evidentiary investigation ineffective due to the passage of time. The district court's own actions, therefore, significantly increased the prejudice to the petitioners. Although it conceded the district court had not properly handled the intrusions, the Court of Appeals condoned the district court's errors and entirely ignored the trial court's own role in enhancing the tainting of

the jury. Its summary affirmation of the district court's ruling on the jury intrusion issue reflects the considerable confusion which already exists concerning the proper procedure for handling incidents of this kind.

In addition, both the lower courts ignored Rule 606(b) of the Federal Rules of Evidence in treating the jury intrusion. When the district court finally interrogated each member of the jury, many weeks after the verdict, it specifically asked each juror over defense objection, whether the incident affected the jurors' deliberations and verdict, and relied upon their statements to the contrary to hold the jury intrusion harmless. This inquiry is one example of the confusion existing among the lower federal courts concerning the propriety under Rule 606(b) of post-verdict inquiries into the subjective effect of extraneous influences on

the jury. Although the district court's error was brought squarely to the attention of the Court of Appeals, the Court of Appeals simply ignored the issue.

Both lower courts handled the jury intrusion question in this case in a manner which has wrought considerable injustice to the petitioners and reflects the confusion which exists in this area of the law. Essentially, both courts ignored controlling legal standards and fair procedure to accomplish their end of affirming the convictions. Such a result-oriented approach cannot possibly square with our legal system's need for principled decision-making when treating issues that go to the very heart of the fairness of the criminal justice system.

Guidance from this Court is needed to clarify and reaffirm the existence of the presumption of prejudice and prevent the kind

of injustice which results in this case from a district court's mishandling of this sensitive subject.

A. The Decision Below is Inconsistent With Well-Established Authority Of This Court And Evidences Widespread Confusion Among The Circuits Concerning Proper Application Of The Strong Presumption Of Prejudice That Applies Whenever There Is A Potentially Damaging Jury Intrusion.

The Court of Appeals recognized that an improper intrusion of damaging extraneous communication into the jury had occurred, as did the district court. In summarily affirming the district court's conclusion that the intrusion was "harmless", the Court of Appeals also followed the district court's lead in ignoring entirely this Court's well-established constitutional doctrine that a "presumption of prejudice" attaches whenever extraneous influences intrude upon the jury. See Remmer v. United States, 347 U.S. 227, 229 (1954) (Remmer I); Mattox v.

United States, 146 U.S. 140, 150 (1892). The disposition of this case is an example of a recent dangerous trend among the circuits particularly in the Ninth and Seventh circuits, weakening significantly this Court's rule that:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . The presumption is not conclusive; but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer I, 374 U.S. at 229.

This Court should review the instant case to provide the lower courts with guidance on the question of the proper application of that presumption of prejudice. For example, petitioners submit that the presumption of prejudice is especially

strong when the intrusion into the jury is by damaging matter going to ultimate issues in the case, e.g., guilt or innocence. A different standard well may be appropriate when the jury intrusion involves peripheral matters. Compare, e.g., United States v. Love, 535 F.2d 1152 (9th Cir. 1976) (a juror's bus stop conversation with defendant was, as defendant conceded, entirely innocent and the rest of the jury knew of its innocuous nature). The offense to due process is all the more egregious when the sub rosa extrinsic opinion of guilt that infects the jury is attributed to the prosecutor. See, e.g., Parker v. Gladden, 385 U.S. 363 (1966) (opinion of guilt expressed by bailiff); Smith v. Phillips, 455 U.S. 209, 221-224 (1982) (O'Connor, J. concurring, including discussion of Leonard v. United States, 378 U.S. 544 (1964) (per curiam) (prospective

jurors who heard trial court announce defendants' guilty verdict in the first trial "automatically disqualified from sitting on a second trial on similar charges.")

In addition, this Court should review this case to resolve the conflict among the Circuits concerning the viability and proper application of the "presumption of prejudice" standard, especially when the jury intrusion involves central or ultimate issues in the case.

The decisions of the courts below are but one example of a recent move away from adherence to the "presumption of prejudice" standard.

Many lower courts cite Remmer and acknowledge the "presumption of prejudice" standard, but apply it in such a weak and loose fashion that it has become meaningless. See e.g. United States v. Tashjian, 660 F.2d

829 (1st Cir.) cert. denied 454 U.S. 1102 (1981); United States v. Sublet, 644 F.2d 737 (8th Cir. 1981); United States v. Fleming, 594 F.2d 598 (7th Cir.) cert. denied 442 U.S. 931 (1979); United States v. Pfingst, 477 F.2d 177 (2d Cir.) cert. denied 412 U.S. 941 (1973). Other courts increasingly ignore the presumption and apply a looser, more amorphous "continuum" approach. See e.g. United States v. Bruscino, 687 F.2d 938 (7th Cir. 1982) (en banc); United States v. Shapiro, 669 F.2d 593, 602-605 (9th Cir. 1982) (Skopil, J. concurring); United States v. Bagnariol, 665 F.2d 877, 885-887 (9th Cir.) cert. denied ___ U.S. ___, 102 S. Ct. 2040 (1982); United States v. Armstrong, 654 F.2d 1328, 1332 (9th Cir.) cert. denied 454 U.S. 1157 and 455 U.S. 926 (1982).

On the other hand, the First, Fifth,

Sixth and Tenth Circuits apply considerably more rigid rules which more vigorously enforce the Remmer presumption of prejudice. See, e.g., United States v. Greer, 620 F.2d 1383, 1385 (10th Cir. 1980); United States v. Doe, 513 F.2d 709, 711-12 (1st Cir. 1975); United States v. Ferguson, 486 F.2d 968, 971 (6th Cir. 1973); United States v. McKinney, 429 F.2d 1019, 1026 (5th Cir.) cert. denied 401 U.S. 922 (1971).

The most dangerous implications of the trend away from the "presumption of prejudice" are revealed in a recent Seventh Circuit decision involving the intrusion of two inflammatory and damaging pieces of inadmissible information into the jury room during trial. See United States v. Bruscino, 687 F.2d 938 (7th Cir. 1982) reversing en banc 662 F.2d 450 (7th Cir. 1981).

The en banc opinion set out the Seventh Circuit's general approach to the standards

for passing on jury intrusions as follows:

> A criminal defendant in our system has a right to be tried on the basis of the evidence admitted at his trial, and this right may be violated if the jury gets access to extra-record evidence . . . But as with so much in our system of criminal justice, this is the statement of an ideal rather than of a standard for when a defendant is entitled to a new trial. For that there has to be some showing of prejudice.

Id. at 940 (emphasis added). The en banc opinion goes on to describe the district court's analysis of the prejudice issue and concludes:

> [t]he district court did not abuse its discretion in concluding that it was highly unlikely that the jury had been prejudiced . . .

Id. at 942 (emphasis added). Instead of applying a presumption of prejudice as required by Remmer, the Seventh Circuit thus explicitly puts the burden on the defendant rather than the government as is required by Remmer.

The Ninth Circuit also has been in the forefront of the movement away from Remmer. Many recent Ninth Circuit decisions do not even cite Remmer or acknowledge that this Court requires explicit application of a presumption of prejudice when extraneous influences intrude into the jury. See e.g. United States v. Bagley, 641 F.2d 1235, 1240-41 (9th Cir.) cert. denied 454 U.S. 942 (1981); Gibson v. Clanon, 633 F.2d 851 (9th Cir.) cert. denied 450 U.S. 1035 (1981); United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979).

Only where the Ninth Circuit is particularly moved by the circumstances of a case is the Remmer presumption of prejudice applied. See United States v. Shapiro, 669 F.2d 593, 599 (9th Cir. 1982) (member of the jury attempted to extort money from the defendant.) Otherwise the courts in the

Ninth Circuit either blithely ignore Remmer, as did the courts below, or explicitly question the propriety of applying the Remmer presumption analysis, see United States v. Shapiro, 669 F.2d at 603-05 (Skopil, J., concurring); United States v. Armstrong, 654 F.2d 1328, 1332 (9th Cir. 1981).

Under this loose continuum approach, if a defendant appears to the reviewing court to be guilty it concludes that he received a fair trial, giving only lip service to the presumption of prejudice. Only if the facts of the case are particularly egregious do the courts actually apply the constitutionally required presumption of prejudice: See e.g., United States v. Shapiro, 669 F.2d 593 (9th Cir. 1982).

Under the Ninth Circuit's approach, for example, Parker v. Gladden, 385 U.S. 363

(1966), the facts of which are only superficially different from those of the instant case, was wrongly decided and should be overruled.

Plainly this Court should review this case to clarify the law of jury intrusion, and to instruct the lower courts as to the meaning and application of the presumption of prejudice, when there is a serious jury intrusion going to ultimate issues in the case.

B. The Decision Below Raises Important Unresolved Questions Which Have Not Been But Ought To Be Decided by This Court Concerning the Kind of Investigation and Proceedings a District Court Must Conduct When It Becomes Aware of a Potentially Prejudicial Jury Intrusion.

In its opinion in the instant case, the Court of Appeals acknowledged that the district court's treatment of the jury intrusion was flawed. Nevertheless, it chose to forgive the district court's highly

prejudicial failings in order to apply its improper continuum approach and affirm the conviction. The Court of Appeal's continuum approach to jury intrusion law thus allowed it summarily to affirm the district court's finding of harmlessness without seriously addressing the procedural deficiencies and tardiness of the district court's evidentiary investigation. Compare Krause v. Rhodes, 570 F.2d 563, 569-70 (6th Cir. 1977); United States v. Betner, 489 F.2d 116, 119 (5th Cir. 1974). See also Remmer v. United States, 347 U.S. 227 (1954), where this Court established minimal parameters for the process to be followed by trial courts in addressing proven jury intrusions.

In the instant case, the trial court's refusal to conduct a timely investigation of the jury intrusion precluded an accurate assessment of its effect on the jury, and

lost all opportunity to cure or cauterize that intrusion.

The trial court's errors began on March 3-4,1981 when Alloway informed the court of her encounter with Waggoner. The district court failed, despite petitioners' request: (1) to ask Alloway if she had discussed the incident with any jurors other than Balash; or (2) to admonish Alloway not to discuss the incident with the other members of the jury; or (3) to seek out the judge who overheard Alloway telling Balash about her encounter with Waggoner and whose version of the Alloway-Balash conversation; or (4) to interview Balash promptly; or (5) to investigate the other jurors' exposure to the extrinsic material; and (6) prematurely concluded that Alloway would be unbiased. See RT 784-85; RT 1133-34; RT 1669.

Had the district court promptly taken

the right steps, it would have both learned the full extent of the jury intrusion and been able to take available measures to minimize or, if possible, cure the intrusion.

The errors in the trial court investigation were compounded when the inquiry at last proceeded once the conflict between Judge Skopil's and Alloway's accounts of the Alloway-Balash conversation was revealed. See CR 105. The ensuing March 31 telephone inquiry of Balash and Waggoner was not only belated but also was improperly conducted. For example, the court asked Balash repeatedly about the subjective effect of the information she heard from Alloway on her deliberations (RT/T.B. March 31, 1981 at 10); relayed Alloway's entire version of the incident to Waggoner and Alloway before questioning them (RT/J.W. March 31, 1981 at 3-4; RT/T.B. March 31, 1981 at 2-3); and did not question

Waggoner about his admitted consultation with Assistant United States Attorney Hoevet prior to his interview (RT/J.W. March 31, 1981 at 2, 14)

In her telephone interview, Balash made the court and counsel aware for the first time that Alloway had also discussed the jury intrusion in the jury room with all the jurors present. RT/T.B. March 31, 1981 at 9. At this point, the trial judge acknowledged that he was remiss in not questioning Balash earlier. RT/T.B. March 31, 1981 at 16. He also stated his understanding, at last, that time was of the essence, "simply because the memories will grow dimmer as time passes." RT/T.B. March 31, 1981 at 16. Nevertheless, interrogation of the remaining jurors did not occur until six weeks later (ten weeks after the Waggoner incident), on May 11, 1981.

The trial court's investigation was

further mismanaged during its belated examination of the remaining jurors. Overruling defendants' continuing objection (See RT May 31, 1981 at 2-3) the court asked all jurors about the subjective effect of the incident on their, and the other jurors' deliberations. RT May 11, 1981 at 7, 11, 15, 19-20, 25-26, 30-31, 33-34, 38, 43, 51-52.

On May 26, 1981, the court denied defendants' motion for a new trial on the basis of the jury intrusion. The court's decision rested heavily on the jurors' subjective representations that Waggoner's "remark played no part whatsoever in their decision." RT Sentencing at 8-9. (Append. at 30a-31a). The trial court attempted to remedy the deficiencies in its proceedings and ruling by entering formal findings of fact and conclusions of law, on August 14, 1981, well after the notice of appeal was

filed. See Append. at 19a.

Where, as here, the trial court's inquiry is tardy, factually incomplete and legally defective, its conclusions do not deserve the same deference as do the conclusions resulting from a prompt and thorough investigation. See, e.g., Krause v. Rhodes, supra, 570 F.2d at 568-70; United States v. Betner, supra, 489 F.2d at 119. Cf. Remmer v. United States, 350 U.S. 377 (1957), district court proceedings after remand deemed inadequate, hence this Court reviewed the evidence as though de novo. See also, comments in United States v. Bagnariol, 665 F.2d 877, 887 (9th Cir. 1981).

This case provides the Court with an unusual opportunity to clarify the requirements as to timeliness and scope of trial court investigation of a proven jury intrusion.

C. The Decision Below Raises Important Unresolved Questions Which Have Not Been But Should Be Decided By This Court Concerning The Effect of Rule 606(b) of the Federal Rules of Evidence On the Scope of a Post-Verdict Inquiry Into Presumptively Prejudicial Extraneous Intrusions Into A Criminal Jury.

When the district court finally conducted its tardy inquiry into the jury intrusions, it repeatedly asked each juror, over vigorous objections by petitioners, e.g. R.T. May 11, 1981 at 2-3, whether the extrajudicial communication affected their deliberations. In its oral ruling on the motion for a new trial, the district court explicitly relied upon the jurors' statements that the incident did not affect their verdict, see Append. 30a-31a.

In affirming, the Court of Appeals stressed the fact that the post-trial examination of the jurors revealed that the incident did not affect them. See Append. at 5a. The Court

of Appeals, like the district court, thus entirely ignored Federal Rule of Evidence 606(b), which was extensively briefed to it.[2/]

Federal Rule of Evidence 606(b) prohibits the kind of inquiry conducted by the District Court in this case. Most of lower federal courts have concluded that Rule 606(b) flatly prohibits post-verdict juror

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2/ The rule provides as follows: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotion as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury' s attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement concerning a matter about which he would be precluded from testifying be received for these purposes."

testimony about the subjective effects of extraneous information on the jury's deliberation. See, e.g. United States v. Greer, 620 F.2d 1383, 1385 N. 2 (10th Cir. 1980); Llewellyn v. Stynchcombe, 609 F.2d 194, 196 (5th Cir. 1980); United States v. Duncan, 598 F.2d 839, 866 (4th Cir. 1979) (cert. denied 444 U.S. 871 (1979); United States v. Wilson, 534 F.2d 375, 378 (D.C. Cir. 1976); United States v. Green, 523 F.2d 229, 235 (2d Cir. 1975) cert. denied 423 U.S. 1074 (1976).

The Ninth Circuit itself appears to have adopted this interpretation of Rule 606(b). See United States v. Bagnariol, 665 F.2d 877, 884-85 (9th Cir. 1981). However, in the instant case, despite extensive briefing of the subject, Court of Appeals ignored Rule 606(b) and its previous interpretation of it.

This is yet another example of the Ninth Circuit's continuum approach to jury intrusion cases.

Other courts, have consistently expressed confusion as to whether Rule 606(b) precludes post-verdict inquiry into subjective effects of intrusion, see Krause v. Rhodes, 570 F.2d 563, 570 (6th Cir. 1977), cert. denied 435 U.S. 924 (1978), or have permitted reliance on post-verdict subjective juror testimony, see United States v. Robbins, 500 F.2d 650, 653 N. 5 (6th Cir. 1974); United States v. Brumbaugh, 471 F.2d 1128, 1129 (6th Cir.) cert. denied 412 U.S. 918 (1973).

This difference in approaches probably results because a number of this Court's decisions give confusing and contradictory indications as to the propriety of such a post-verdict inquiry.

Most of the lower courts construe Rule 606(b) as consistent with this Court's long-

standing common law rule that:

> A juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.

Mattox v. United States, 146 U.S. 140, 149 (1892). See e.g. United States v. Bruscino, 687 F.2d 938, 941 (7th Cir. 1982) (en banc); United States v. Wilson, 534 F.2d, 375, 378. (D.C. Cir. 1976).

The holding of Mattox appears to be inconsistent with a literal reading of this Court's opinion in the cases of Remmer v. United States, 347 U.S. 227, 229-30 (1954)(Remmer I), and Remmer v. United States, 350 U.S. 377, 379 (1956) (Remmer II).

In Remmer, a criminal juror was informed by a third party that the juror could profit by bringing in a verdict favorable to the defendant. Remmer v. United States, supra, 347 U.S. at 228. The district court denied a

motion for a new trial without a hearing and was affirmed by the Court of Appeals on the grounds that the defendant had not shown prejudice. Id. at 229. This Court vacated the judgment and ordered a remand to the district court for a hearing to determine "the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." Id, at 230. (emphasis added). When the case came before this Court for the second time, the Court reiterated that it was concerned with the "impact" of the incident on the juror. Remmer v. United States, 350 U.S. 377, 379 (1959). This Court's use of the term, "impact," in its Remmer opinions strongly implies that a district court conducting any post-trial hearing in response to allegations of jury intrusion, should inquire into the subjective effect of such extraneous influences on the jury.

Although the Court's opinion in Remmer I cites Mattox as to its holding that the burden is on the Government to establish the harmlessness of jury intrusions, it does not acknowledge the other holding of Mattox which prohibited inquiry into the subjective "impact" of extraneous influences on the jury. Remmer v. United States, supra, 347 U.S. at 229. Thus, this Court's Mattox and Remmer decisions give conflicting directions as to the proper scope of a post-verdict Remmer hearing into allegations of jury intrusion.

Recently, this Court rendered a decision on the related issue of implied juror bias which further confused the question as to the effect of Rule 606(b) on post-verdict hearings into allegations of jury misconduct or intrusion. See Smith v. Phillips, 455 U.S. 209 (1982). Smith, involved habeas review of a state court criminal conviction by a jury a member of

who during trial submitted an employment application to the office that was prosecuting the case.

This Court addressed the issue of whether due process imposes a conclusive presumption of bias in such circumstances. This Court held that due process does not require juror bias to be imputed. It only requires a hearing in which defendants can show actual bias. Id. at 217.

Although Smith concerned allegations of juror bias rather than allegations of extraneous influence on the jury, and, therefore, the Remmer presumption of prejudice did not apply, the Court quoted Remmer I to describe the kind of hearing which would satisfy due process in cases involving allegations of jury partiality. Id. at 215-16. The Court specifically quoted Remmer's direction to the trial court to determine, among other things,

the "impact" of the impropriety upon the jury.

In a footnote, the Court specifically addressed the question of the role of subjective juror testimony in such "Remmer" type hearings, and relying on language from Dennis v. United States, 339 U.S. 162, 171 (1950), indicated that such subjective juror testimony is both permissible and not suspect. Dennis, however, involved pre-trial voir dire of jurors rather than post-verdict impeachment testimony by jurors, as was involved in Smith and is involved in the instant case. Yet, in Smith ,the Court cited Dennis as though it were not distinguishable from Smith on this basis. Id. Moreover, nowhere in its opinions does the Court address the apparent inconsistency of this approach with Mattox, nor the implications of the Smith dictum in circumstances,unlike those in Smith (a habeas review of a state conviction), where Rule 606(b) applies. Since the Mattox rule

parallels Rule 606(b), the Smith opinion further exacerbates the already existing confusion and conflict among the lower courts as to whether it is proper to inquire after verdict into subjective effects on the jury's deliberations.

Indeed, the case at bar is but one example of the considerable confusion among the lower courts concerning the effect of Rule 606(b) on post-trial inquiries into jury intrusions. See United States v. Greer, 620 F.2d 1383, 1385 (10th Cir. 1980). There are explicit conflicts among the circuits on this question. Compare e.g. United States v. Robbins, 500 F.2d 650, 653 N.5 (6th Cir. 1974) (inquiry permitted) with, e.g., United States v. Greer, 620 F.2d 1383, 1385 N.2 (10th Cir. 1980) (inquiry proscribed). And, the majority of the circuits apply Rule of Evidence 606(b) to prohibit the kind of

subjective juror testimony which recent dicta of this Court in Smith has implicitly encouraged. Review should be granted in this case where such subjective testimony was elicited and relied upon by the trial court, to enable this Court to address this issue definitively and provide clear guidance to the lower courts on this recurring problem.

II. THE DECISION BELOW RAISES IMPORTANT UNRESOLVED QUESTIONS OF FEDERAL LAW CONCERNING THE APPLICATION OF THE FOURTH AMENDMENT IN CIRCUMSTANCES WHERE A PROLONGED SURREPTITIOUS AND WARRANTLESS FEDERAL CRIMINAL INVESTIGATORY SEARCH OF A SUSPECT'S PAPERS AND FILES IS CONDUCTED THROUGH THE AGENCY OF A CIVIL STATE AUDITOR.

The district court denied petitioner's motion to suppress all evidence seized as a result of the search conducted by Lauritsen and Griffith, on alternative grounds. First, the court held there was no evidence that the motive for the state auditor's investigation was to gain evidence for a federal criminal

prosecution or that the state auditor's cooperation with the federal agent was unlawful, even though it found that "somewhere along the way it turns from a straight audit into a criminal prosecution . . ." RT Feb. 9, 1981 at 104-06, Append. at 35a-37a. Second, the district court held that petitioners "quite clearly consented validly and knowingly and intelligently in the provider agreements to the kind of examination had and furnishing of records that has occurred in this case." RT Feb. 9, 1981 at 106, Append. at 38a.

The Court of Appeals affirmed the district court on the grounds that "[a] defendant has no privacy interest in material in the possession of a third person. United States v. Miller, 425 U.S. 435 (1976)" (Append. at 6a). The Court of Appeals' reliance on United States v. Miller, 425 U.S. 435 (1976),

to condone a six-month long secret warrantless federal criminal search under the guise of a lengthy civil audit of books and records raises an important issue of federal law which has not been, but should be settled by this Court.

In Miller, this Court considered the Fourth Amendment rights of a defendant challenging the use in a federal prosecution of bank records which federal agents procured by service of subpoenas duces tecum on two banks. The Court held that defendant's motion to suppress had been correctly denied since the defendant possessed no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas. The Court reasoned that the documents subpoenaed and produced were "the business records of the banks," that the documents contained "only information voluntarily conveyed to the banks

and exposed to their employers in the ordinary course of business", "[t]he lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act" and "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party, and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." 425 U.S. at 440, 442-43.

Subsequently, in United States v. Payner, 447 U.S. 727 (1980), this Court cited Miller in holding that a defendant lacked standing under the Fourth Amendment to suppress bank records illegally seized from a third party -- a bank vice-president -- even

though federal agents approved the plan of a private investigator retained by a federal agent to steal the documents". 447 U.S. at 731-32.

The facts of this case are clearly distinguishable from those of either Miller or Payner. Significantly, this case does not involve the mere exertion of federal control over documents lawfully within the possession of a true third party. In this case, a federal officer conducted a secret search of documents in defendants' possession through his agent, who pretended simply to be conducting a civil audit of a closely regulated business but was actually pursuing a federal criminal investigation and prosecution without a warrant and without defendants' consent. See Elkins v. United States, 364 U.S. 206 (1960) (repudiating the "silver platter" doctrine). This improper search led to the production of evidence which was the basis

for the criminal prosecution that followed.

By defining the state auditor as a third party, the Ninth Circuit's decision implicitly finds that the state auditor was not a federal agent. This determination is inconsistent with the standard applied in Hoffa v. United States, 385 U.S. 293, 295-99 (1966), in which a private individual who agreed to become an informant and obtain information for the government was deemed a government agent.

The Fifth Circuit has held that a federal search occurred when a federal informant and a federal officer participated in certain phases of a search, United States v. Sellers, 483 F.2d 37, 42 N. 4 (5th Cir. 1973), cert. denied, 417 U.S. 908 (1974). This Court has held that a search is a search by a federal officer "if he had a hand in it," Lusting v. United States, 338 U.S. 74,

78-79 (1949).

The holding of the Ninth Circuit in this case reflects the unsettled nature of the law governing cooperation between civil regulatory agents and federal criminal agents. The tension between the government's interest in permitting and encouraging cooperative law enforcement efforts between state officers and federal agents and between civil and criminal investigations and the requirements of the Fourth Amendment presents an issue similar to that addressed by the Sixth Circuit in United States v. Searp, 586 F.2d 1117 (6th Cir. 1978), cert. denied 440 U.S. 921 (1979). Searp, concerned the question of whether evidence seized under a state warrant in conformity with state law, but in violation of federal statutory procedures, is admissible in federal court. The Sixth Circuit noted that "the temptation to federal

officers to take advantage of more lenient or more flexible state procedures in the course of conducting a federal investigation is still a reality" and that "when a federal officer has participated in a search in an official capacity, his or her conduct, and thus the legality of the search, is to be judged by federal standards" 586 F.2d at 1121. The federal character of the search and seizure thus is not affected by the fact that an investigation search and seizure are jointly undertaken by state and federal officers. Id.

In line with this approach, the Second Circuit has held that a search by federal officers violated defendant's Fourth Amendment rights when federal agents failed to obtain a search warrant to examine documents taken lawfully into custody by city police. United States v. Birrell, 470 F.2d

113 (2d. Cir. 1972). The Second Circuit ruled that "a search by law enforcement officers of another sovereign for a different purpose could not be made without a warrant," 470 F.2d at 117, and reversed the convictions with instructions to dismiss the indictment.

Neither Miller nor Payner provide guidance to the lower courts on the question of how the protections of the Fourth Amendment apply in circumstances such as those of the instant case, involving secret Federal criminal investigations through an agent who obtains consent to examine defendants' records under the guise of conducting a civil audit for a state agency. Just as federal criminal law enforcement officers may find it tempting to take advantage of more lenient state criminal law procedures, this case shows that federal criminal investigators will secretly use a

state civil audit for the purpose of pursuing a criminal investigation and prosecution to deprive defendants of the protection of the Fourth Amendment.

The alternative ruling of the trial court was that defendants' consent to the federal criminal investigation search and seizure arose from the Medicare and Medicaid provider agreements. The Court of Appeals did not explicitly rely upon nor reject this conclusion. To the extent that the decision of the Court of Appeal may be justified by this alternative holding, its decision is fundamentally inconsistent with Dept. of Health v. Florida Nursing Home Assn., 450 U.S. 147 (1981), in which this Court held that such a provider agreement could not be the basis upon which to conclude waiver of other constitutionally protected rights by a state. C.f. Marshall v. Barlows, Inc., 436

U.S. 307, 318 (1978).

This Court should review this case to clarify this important question of search and seizure law, that is, whether a civil audit by a regulatory agency may serve sub rosa as an opportunity for federal criminal evidence gathering.

## CONCLUSION

For all of the reasons discussed above, a writ of certiorari should issue in this case.

Respectfully submitted,

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June 1983

FILED: May 9, 1983

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>EDWARD PAUL CHARAPATA,<br><br>Defendant-Appellant. | ) | Nos. 81-1394<br>81-1396<br><br>ORDER |
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>ANNE CHARAPATA,<br><br>Defendant-Appellant. | ) | |

Before: GOODWIN and POOLE, Circuit Judges, and WILKINS*, District Judge.

The panel as constituted in the above case has voted to deny the petition for

*The Honorable Philip C. Wilkins, Senior United States District Judge for the Eastern District of California, sitting by designation.

for rehearing. Judges Goodwin and Poole vote to reject the suggestion for rehearing en banc and Judge Wilkins recommends such rejection.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED: Jan. 18, 1983

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. EDWARD PAUL CHARAPATA, Defendant-Appellant. | ) | No. 81-1394 MEMORANDUM D.C. # CR 80-148 JMB |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ANNE CHARAPATA, Defendant-Appellant. | ) | No. 81-1396 |

Appeal from the United States District Court for the District of Oregon

Honorable James M. Burns, District Judge, Presiding

Argued and Submitted May 5, 1982

Before: GOODWIN and POOLE, Circuit Judges, and WILKINS, District Judge*.

*The Honorable Philip C. Wilkins, Chief Judge for the Eastern District of California, sitting by designation.

Appellants challenge their conviction for making false statements to a government agency on nursing home cost reimbursement documents, 18 U.S.C. § 1001; and for filing false corporate income tax returns, 26 U.S.C. §§ 7206(2), 7203. Edward Charapata also appeals his conviction for filing false individual tax returns, 26 U.S.C. § 7206(1); and for shipping uninspected meat in interstate commerce, 21 U.S.C. §§ 610(b)(2), 676.

The Charapatas first argue that reversal of their convictions is required because of jury intrusion. We disagree. When the jury is exposed to extrinsic material, "[t]he defendant is entitled to a new trial if the judge finds a 'possibility that the extrinsic material could have affected the verdict.'" United States v. Bagnariol, 665 F.2d 877, 885 (9th Cir. 1981)(quoting United States v.

Vasquez, 597 F.2d 192, 193 (9th Cir. 1979). We affirm the district court's finding that any intrusion was harmless beyond a reasonable doubt.

The jury intrusion, although improper, was in context not of great impact.[1/] Examination of the jurors subsequent to trial disclosed that the incident left little if any impression; few remembered anything significant about the incident. The statement was expressed as an opinion and not an objective fact, and was not made by one in a position of real or apparent authority in the court. Cf. Parker v. Gladden, 385 U.S. 363 (1966).

The district judge gave instructions that went far toward curing any taint. At the commencement and conclusion of each day's hearing, he reminded the jury not to discuss the case or expose themselves to extrinsic information about the case.

The district judge also repeatedly instructed the jury to consider only evidence presented at trial. See United States v. Bagnariol, 665 F.2d at 889 (district judge instructed the jury on each day to consider only the evidence produced at trial); United States v. Bagley, 641 F.2d 1235, 1241 (9th Cir. 1981) (curative instruction "generally deemed curative of prejudicial impact.")

The district court found, and we agree, that there was strong evidence of the Charapatas' guilt with respect to the offenses of which they were convicted. See United States v. Bagnariol, 665 F.2d at 889; United States v. Bagley, 641 F.2d at 1241.

While appellants argue that the district judge's examination into the jury intrusion was inadequate, the extent and nature of a hearing into jury

misconduct is properly largely within the discretion of the trial judge. United States v. Berry, 627 F.2d 193, 197 (9th Cir. 1980). With the benefit of hindsight one might argue that a more thorough-going examination would have been preferred. We are satisfied however that the examination was not inadequate in light of the factual setting, the strong evidence against appellants and the curative instructions given. We note that appellants expressed satisfaction on this issue after the district judge's initial examination of the juror exposed to the extrinsic information, and that no objection was raised when the jurors were not placed under oath before questioning.

Appellants next argue that the district court erred in refusing to suppress certain documents. We disagree. The defendants voluntarily relinquished these

documents to a state official who turned the material over to federal investigators. A defendant has no privacy interest in material in the possession of a third person. United States v. Miller, 425 U.S. 435 (1976).

Appellants' other contentions are without merit.

The judgment of the district court is AFFIRMED.

FOOTNOTES

1/ This claim is inapplicable to Edward Charapata's conviction for shipping uninspected meat, as that count was tried separately.

During the trial juror Alloway reported having been approached at a bus stop by a courtroom spectator who identified himself as "the brother of one of the attorneys." They discussed

"the boring nature" of the trial, until Alloway told him to change the subject. Later, she said that the person might have "insinuated or implied" that the defendants were guilty; she remembered no flat statement of guilt. Subsequently, in the courthouse elevator, she mentioned the incident to another juror. A judge who was also in the elevator advised her to report the incident. Other members of the panel were subsequently questioned and none indicated the narrative had great impact. The trial judge concluded that the probability of any effect on the verdict was slight and involved no substantial prejudice to the defendants.

FILED: Jun. 10, 1981

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| vs. | ) | CR 80-148-1 |
| | ) | |
| EDWARD PAUL CHARAPATA, | ) | JUDGMENT OF |
| | ) | CONVICTION |
| Defendant. | ) | AND COMMIT-MENT |

On this 26th day of May, 1981, appeared the attorney for the government and the defendant appeared in person and with his attorney Norman Sepenuk.

IT IS ADJUDGED the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of filing false claims and statements to H.E.W. for nursing homes, in violation of 18 USC 1001 and 2, as charged in counts 1 through 13; subscribing false joint U.S. Individual Income Tax Returns for calendar years 1975 and 1976, in violation of 26 USC 7206(1), as charged in counts 14 and 15;

subscribing false U.S. Corporation Income Tax Returns for calendar year 1975, in violation of 26 USC 7206(1), as charged in counts 16 and 17; aiding and assisting in preparation of false U.S. Corporation Income Tax Return for calendar year 1976, in violation of 26 USC 7206(2), as charged in count 18; and selling and transporting in Interstate Commerce Uninspected meat and meat food products, in violation of 21 USC 610(b)(2) and 676, as charged in count 20 of the indictment.

The Court then having asked the defendant personally whether he had anything to say why judgment should not be pronounced and he personally having made a statement to the Court, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED on count 1, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, 18 USC 4205(a).

IT IS ADJUDGED on counts 2 through 18 and 20, the imposition of sentence is suspended and the defendant placed on probation for a period of five (5) years on each count, to run concurrently with each other and to commence upon defendants release from physical custody on count 1, upon the conditions of probation as contained in Probation Form No. 7 and the following special conditions:

1. As to counts 14, 15, 16, 17 and 18, the defendant shall pay all taxes due and owing and shall obey all tax laws.

2. Defendant shall submit a complete and truthful financial statement to the probation officer and shall provide

accompanying documentation as requested, at such times as directed by the probation officer.

3. As to counts 3, 4, 7 and 12, the defendant shall make restitution in the amount of $40,802.00.

4. As to counts 2 through 13, defendant shall pay a fine in the amount of $10,000.00 on each count, said fine to be paid within two (2) years of the commencement of the probation period, total $120,000.00.

5. As to counts 14 through 18, the defendant shall pay a fine in the amount of $5,000.00 on each count, at such times and in such amounts as determined by the probation officer, total $25,000.00.

6. As to count 20, the defendant shall pay a fine in the amount of $10,000.00, at such times and in such amounts as determined by the probation officer.

7. As to counts 14 through 18, the defendant shall pay the cost of prosecution in the amount of $49,519.09.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and the copy serve as the commitment of the defendant.

DATED this 10 day of June, 1981.

/s/ James M. Burns
JAMES M. BURNS
Chief Judge

FILED: Jun. 10, 1981

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| vs. | ) | CR 80-148-2 |
| | ) | |
| ANNE CHARAPATA, | ) | JUDGMENT OF |
| | ) | CONVICTION AND |
| Defendant. | ) | COMMITMENT |

On this 26th day of May, 1981, appeared the attorney for the government and the defendant appeared in person and with her attorney Frank Noonan.

IT IS ADJUDGED the defendant has been convicted upon her plea of not guilty and a verdict of guilty of the offenses of filing false claims and statements to H.E.W. for nursing homes, in violation of 18 USC 1001 and 2, as charged in counts 5, 11 and 13; aiding and assisting in preparation of false U.S. Corporation Income Tax Return for calendar year 1976, in violation of 26 USC 7206(2) as charged in count 18 of the indictment.

The Court then having asked the defendant personally whether she had anything to say why judgment should not be pronounced and she personally having answered no, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED on count 11, the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years, 18 USC 4205(a).

IT IS ADJUDGED on counts 5, 13 and 18, the imposition of sentence is suspended and the defendant placed on probation for a period of five (5) years on each count, to run concurrently with each other and to commence upon defendants release from physical custody on count 11, upon the conditions of probation as contained in Probation Form No. 7 and the following special conditions:

1. As to count 18, the defendant shall pay all taxes due and owing and shall obey all tax laws.

2. Defendant shall submit a complete and truthful financial statement to the probation officer and shall provide accompanying documentation as requested, at such times as directed by the probation officer.

3. As to counts 5 and 13, defendant shall make restitution in the amount of $14,365.00.

4. As to counts 5 and 13, defendant pay a fine in the amount of $10,000.00 on each count, said fine to be paid within two (2) years following the commencement of the probation period, total $20,000.00.

5. As to count 18, defendant pay a fine in the amount of $5,000.00, said fine to be paid within two (2) years following the commencement of the probation period.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and the copy serve as the commitment of the defendant.

DATED this 10 day of June, 1981.

/s/ James M. Burns
JAMES M. BURNS
Chief Judge

FILED: Aug. 14, 1981

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | No. CR 80-148 |
| | ) | |
| v. | ) | FINDINGS AND |
| | ) | CONCLUSIONS AS |
| EDWARD CHARAPATA and | ) | TO MOTION FOR |
| ANNE CHARAPATA, | ) | NEW TRIAL |
| | ) | |
| Defendants. | ) | |
| | ) | |

On March 12, 1981, after a lengthy jury trial, defendants Edward and Anne Charapata were found guilty on several charges relating to Medicare and Medicaid fraud and the filing of false income tax returns. Defendants subsequently moved for a new trial on the basis of an outside communication which one of the alternate jurors received during the course of the trial. Evidentiary hearings concerning this matter were held on March 31, and May 11, 1981. At the time of sentencing,

on May 26, 1981, I orally denied the motion for a new trial. In accordance with my prior ruling, and at the suggestion of counsel, I enter the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) Trial in this case commenced on February 24, 1981, and concluded on March 12, 1981, when the jury returned a verdict of guilty against defendant Edward Charapata on Counts 1 through 18 of the indictment, and against defendant Anne Charapata on Counts 5, 11, 13 and 18. Both defendants were acquitted by the jury on Count 19.

2) During the course of the trial, on March 2, 1981, alternate juror Delpa Alloway had a brief conversation outside the courtroom with Mr. Jack Waggoner, brother-in-law of Ronald Hoevet, one of the Assistant United States Attorneys

prosecuting the case for the government. Mr. Waggoner had been in the courtroom during part of the proceedings on that day, and he and Mrs. Alloway recognized each other (as having been in the courtroom that day) as they waited at a bus stop near the courthouse. The two spoke generally about the boring nature of the proceedings; Mr. Waggoner informed Mrs. Alloway of his relation to attorney Hoevet. Mr. Waggoner then made some general comments on some past cases attorney Hoevet had worked on, and the conversation ended.

3) From Mr. Waggoner's remarks, Mrs. Alloway concluded that he had insinuated or implied that in his opinion the Charapatas were guilty.

4) The following morning (March 3) on the way to the courtroom, Mrs. Alloway rode in the elevator with Tawny Balash,

one of the regular jurors sitting on the case. Mrs. Alloway told Mrs. Balash that a relative of one of the attorneys had come up to her after court on the previous day and told her that in his opinion the defendants were guilty. Mrs. Alloway asked Mrs. Balash what she should do, and Mrs. Balash replied that she should tell the judge what happened. When interviewed by the court on March 31, Mrs. Balash recalled that she did not think much about the incident at the time, but she saw that Mrs. Alloway was very upset. (TR.4, telephone conference of Tawny Balash.

5) Mrs. Alloway reported the encounter with Mr. Waggoner to the court before trial began on March 3. She was interviewed by the court out of the presence of the other jurors. In response to the court's inquiry, she stated that the

incident would have no bearing on her ability to sit fairly as a juror on the case. (TR.781, Vol. 6; removed and placed in Vol. 13.) As it turned out, Mrs. Alloway's services as an alternate juror were not needed. She was dismissed at the conclusion of the case and did not participate in the verdict deliberations.

6) At some point shortly after the incident occurred, Mrs. Alloway mentioned it to some of the other jurors and alternate jurors. Of the twelve jurors who actually deliberated on and voted for the verdict, ten (Clark, Setziel, Twedt, Immer, Liebel, Miston, Roton, Saxton, Frentress and Daniels) recalled only that Mrs. Alloway had had a contact with some person outside the courtroom. These ten did not remember any discussion among the jurors as to the content of the conversation which Mrs. Alloway had outside the

courtroom. They remembered only that the outside conversation had something to do with the case. (TR. generally, Examination of Jurors.)

7) Juror Dobbs, one of the deliberating jurors, recalled that the remarks made to Mrs. Alloway were "rather pointed;" that is, that they pertained to either guilt or innocence. However, juror Dobbs could not recall which way the remarks heard by Mrs. Alloway were "pointed." (TR.44 Examination of Jurors.)

8) Juror Jaynes recalled hearing that the person Mrs. Alloway spoke with had said that the defendants were guilty. Although a regular juror, Jaynes was excused later on during the trial for other reasons; she did not participate in the verdict deliberations. She was replaced by alternate juror Daniels. (TR.48 Examination of Jurors.)

9) Of the jurors who deliberated on the verdict, only Mrs. Balash recalled being told by Mrs. Alloway that the person she had encountered had said that the defendants were guilty. Mrs. Balash received this information in the elevator with Mrs. Alloway, when no other jurors were present.

10. Many of the jurors, including jurors Twedt, Miston, Toron, Saxton, Dobbs, and Balash, and alternate juror Bromley, indicated that they viewed the incident as insignificant and thought that Mrs. Alloway overreacted to an unintentional, casual encounter.

11. All members of the jury, including the alternates, stated that the incident involving Mrs. Alloway was mentioned only once, sometime shortly after it happened. The incident was not discussed again and it was not brought up during the verdict deliberations.

12) All deliberating jurors indicated that they were able to follow the court's admonition that the case was to be decided solely on the evidence and instructions presented in court. All the alternates indicated, in response to a hypothetical question, that if they had been called upon to deliberate on the case they would have been able to decide the case solely on the evidence and instructions presented, and that incident involving Mrs. Alloway would have played no part in their decision.

13) I am satisfied that each of the jurors and alternate jurors testified truthfully when he or she said that the incident was thought of as insignificant and that it did not affect their ability to follow the court's admonitions to decide the case solely on the evidence and instructions.

CONCLUSIONS OF LAW

1) The incident involving Mrs. Alloway, as it was related to the other jurors, was not in fact prejudicial to the defendants, or, if so, was not so prejudicial that it deprived them of a fair trial.

2) Whether or not the jurors' own statements concerning the effect the incident had on their deliberations are considered, there is no reasonable possibility, given all the circumstances of this case, that the incident could have affected the jury's verdict. See United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979.)

3) Whether or not the juror's own statements concerning the effect the incident had on their deliberations are considered, it is certain beyond a reasonable doubt that the incident did not affect or taint the jury's verdict. See Gibson v.

Clanon, 633 F.2d 851, 855 (9th Cir. 1980); United States v. Bagley, 641 F.2d 1235, 1240-41 (9th Cir. 1981).

4) These conclusions are based on the following considerations, among others: (1) Mrs. Alloway interpreted Mr. Waggoner's comments as only an opinion of the defendants' guilt; (2) although related to an attorney in the case, Mr. Waggoner had no position of authority or attarent [sic] authority in the court; (3) ten of the deliberating jurors recalled only that Mrs. Alloway had an encounter outside the courtroom, they did not recall anything about an opinion on guilt; (4) the jurors thought Mrs. Alloway was overreacting to a casual encounter; (5) the incident was brought to the jury's attention only once during the course of a lengthy trial; (6) the court was able to give effective curative and remedial instructions; (7) there

was strong evidence of guilt as to all counts on which defendants were convicted; and, (8) the jury acquitted defendants on Count 19.

5) No matter how the applicable test is phrased, the motion for a new trial must be denied.

The foregoing shall constitute Findings of Fact and Conclusions of Law pursuant to Rule 52, Fed.R.Civ.P.

DATED this 14 day of August, 1981.

/s/ James M. Burns
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>EDWARD CHARAPATA and ANNE CHARAPATA,<br><br>Defendants. | No. CR-80-148<br><br>REPORTER'S PARTIAL TRANSCRIPT OF ORAL BENCH RULING AND FINDINGS OF FACT ON DEFENDANTS' MOTION FOR NEW TRIAL, May 26, 1981 |

THE COURT:

The motion for new trial is denied. I am satisfied under any of the standards applicable in the Ninth Circuit, number one, that the extrinsec [sic] material was not in fact, prejudicial; and, number two, it was not sufficiently prejudicial to affect the Defendants' opportunity to have a fair trial.

Specifically, I rely on the accounts furnished by each of the members of the

jury; those who were alternates throughout; those who were regular jurors throughout and the one juror who changed positions in that regard.

I am also satisfied that, that each of the jurors was truthful and correct when he responded that whatever they did here [sic] of the episode was described as insignificant. They were fully aware of the admonitions which had been given throughout the trial, before and after this incident, and that they were fully able to follow and comply with those admonitions and that the remark played no part whatsoever in their decision.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| UNITED STATES OF AMERICA, Plaintiff, vs. EDWARD CHARAPATA and ANNE CHARAPATA, Defendants. | No. CR-80-148 REPORTER'S PARTIAL TRANSCRIPT OF ORAL BENCH RULING AND FINDINGS ON DEFENDANT ANN CHARAPATA'S MOTION FOR SEVERANCE, March 10, 1981 |

THE COURT:

Well, I'm ready to rule. I think the Government has to fish or cut bait on this one and I think they have already in fact made their decision by putting Mr. Engelgau on and by offering 653 and 654. I am satisfied that a limiting instruction -- well, I'm satisfied, first of all, that the analysis is not that of business record but that of an admission by a party opponent that it comes in somewhat in the same way

that if a police officer is on the stand and testified that he prepared an accident report and he says that as a part of his accident investigation he interviewed the defendant and the defendant said he ran the red light, that part of the report comes in, not because primarily it is a business record. It comes in primarily because it's an admission by a party opponent. In that sense it would come in only as against Mr. Charapata, at least in circumstances presented here, that I find no other, no other avenue of admissibility as against Mrs. Charapata for that and I find that the prejudicial impact that it would have on her is such that a limiting instruction would not be adequate to furnish the appropriate safeguards to which she's entitled as regards tax counts. Consequently, I grant the defendant's motion,

Defendant Charapata's motion for severance insofar as it relates to Counts XIV and XV.

The same analysis does not require, in my judgment, severance of the other charges against her, either the Medicaid or Medicare false statements in which she is named or the corporate tax charges in which he is named, and I will furnish, with the assistance of Counsel, an appropriate limiting instruction that it is applicable only as regards Edward Charapata and only as reqards Counts XIV and XV and not applicable for any other purpose.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| UNITED STATES OF AMERICA, Plaintiff, | ) | No. CR-80-148 |
| vs. | ) | REPORTER'S PARTIAL TRANSCRIPT OF ORAL BENCH RULING AND FINDINGS OF FACT ON DEFENDANTS' MOTION TO SUPPRESS, February 9, 1981 |
| EDWARD CHARAPATA and ANNE CHARAPATA, Defendants. | ) | |

THE COURT: Well, if that's the law, it's going to have to take the Ninth Circuit or the Supreme Court to say so. I'm not going to say that is the law. It may be. In fact, I would not be able to make a finding which, I think, is necessary to your theory that the obtaining by Lauritsen was prompted by Griffith and was prompted by Griffith with criminal motivation. There is no such evidence in this record; there wasn't evidence

anywhere along the way that I recall in the enormous record compiled over the last three years in the various Grand Jury proceedings, including one which essentially tracks this contention. There isn't any evidence that the motivation was, we are going to prosecute, we are going to proceed criminally, we are going to gain evidence to do so and thus, we are going to ask Mr. Lauritsen to funnel the stuff to us. That isn't what the facts are in this case. And I find exactly the contrary.

Now, the fact that Lauritsen in his function comes across documents which are questionable, he in turn, makes them available to Griffith, and the fact that along the way Mr. Griffith himself has questions about their validity and the priority of the expenses shown, and so on, doesn't mean they can't be used. At

least my understanding of the law is such.

The fact that somewhere along the way it turns from a straight audit into a criminal prosecution, you don't go back and rule out everything that Mr. Lauritsen did in 1976 and '77.

Also, I am satisfied, based upon the record and upon the submissions, that I have grave doubt whether or not these individual defendants had a reasonable expectation of privacy, though I need not reach that question at least along the lines the Government asserts as its justification, because I think it is quite clear that the defendants or others on their behalf, or the corporate owners all quite clearly consented to the providing of this information to either federal or state, federal or state auditors or other officials who could audit the books and records and make sure the program was

being carried out properly, so that the defendants, assuming they had a reasonable expectation or standing as we used to call it -- quite clearly consented validly and knowingly and intelligently in the provider agreements to the kind of examination had and furnishing of records that has occurred in this case.

And the scope of that concern was not expressly limited to any civil audit or state audit, or state civil matter as opposed to a federal audit, or federal criminal investigation.

I deny the motion to suppress.

# UNITED STATES
# CONSTITUTIONAL PROVISIONS

## AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses

in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CODE

TITLE 18

§ 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 1001. Statements or entries generally.

Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material

fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

TITLE 21

§ 610. Prohibited Acts.

No person, firm, or corporation shall, with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products of any such animals--

* * * *

(c) sell, transport, offer for sale or transportation, or receive for transportation, in commerce, (1) any

such articles which (A) are capable of use as human food and (B) are adulterated or misbranded at the time of such sale, transportation, offer for sale or transportation, or receipt for transportation; or (2) any articles required to be inspected under this subchapter unless they have been so inspected and passed;... .

§ 676. Violations-Misdemeanors; felonies: intent to defraud and distribution of adulterated articles; good faith

(a) Any person, firm or corporation who violates any provision of this chapter for which no other criminal penalty is provided by this chapter shall upon conviction be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if such violation involves intent to defraud, or any

distribution or attempted distribution of an article that is adulterated (except as defined in section 601(m)(8) of this title), such person, firm, or corporation shall be subject to imprisonment for not more than three years or a fine of not more than $10,000, or both: Provided, That no person, firm, or corporation, shall be subject to penalties under this section for receiving for transportation any article or animal in violation of this chapter if such receipt was made in good faith, unless such person, firm, or corporation refuses to furnish on request of a representative of the Secretary the name and address of the person from whom he received such article or animal, and copies of all documents, if any there be, pertaining to the delivery of the article or animal to him.

(b) Nothing in this chapter shall be construed as requiring the Secretary to report for prosecution or for the institution of libel or injunction proceedings, minor violations of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice of warning.

TITLE 26

§ 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such

records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§ 7206. Fraud and false statements. Any person who --

(1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. -- Willfully aids or assists in, or procures,

counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

* * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

FEDERAL RULES OF EVIDENCE

Rule 606(b). Inquiry into validity of verdict or indictment.

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occuring during the course of a jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about

which he would be precluded from testifying be received for these purposes.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8. Joinder of Offenses and of Defendants.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such

defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.